

NATIONAL WILDLIFE FEDERATION ET AL.

v.

BUREAU OF LAND MANAGEMENT

IBLA 95-475

Decided September 24, 1998

Appeal from an order of Administrative Law Judge Ramon E. Child dismissing for lack of jurisdiction an appeal of a modification of a grazing lease for livestock use on the Santa Maria Ranch allotment. AZ-026-95-05046.

Reversed and remanded.

1. Appeals--Board of Land Appeals--Rules of Practice:
Appeals: Jurisdiction--Rules of Practice: Appeals:
Standing to Appeal

An administrative law judge's dismissal of a grazing appeal on the grounds that the decision appealed was not subject to appeal will be reversed, and the case remanded for hearing where the action appealed was a final decision that may have modified the terms and conditions of the grazing lease or created a grazing system outside the scope of that authorized by an Environmental Assessment.

APPEARANCES: Kimi A. Matsumoto, Esq., and Thomas D. Lustig, Esq., National Wildlife Federation, Boulder, Colorado; Joseph M. Feller, Esq., Arizona State University College of Law, Tempe, Arizona, for Appellants. Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Appellants National Wildlife Federation, The Wilderness Society, Yuma Audobon Society, Arizona Wildlife Federation, Joseph Feller, and Jeff Burgess have appealed an April 19, 1995, Order (Order) of Administrative Law Judge Ramon E. Child dismissing their appeal of a December 22, 1994, letter of the Lower Gila Resource Area Manager, Bureau of Land Management (BLM), which advised that the terms and conditions of the May 31, 1991,

grazing lease for the Santa Maria Ranch allotment had been modified. The April 19, 1995, Order appealed from determined that "neither the December 22, 1994 letter nor any other document before this office constitutes a final decision from which appeal may be taken to this office." (Order at 2.) The appeal was thereafter dismissed and a timely appeal taken to this Board (Interior Board of Land Appeals).

The Santa Maria Ranch grazing allotment includes more than 40,000 acres of Federal and State land in Arizona. In 1990, BLM proposed to issue a livestock grazing lease for the Santa Maria Ranch allotment with no restrictions to protect environmental resources. In response to protests by certain of the Appellants in the present case, BLM prepared an Environmental Assessment and Record of Decision (EA/ROD) that was issued, along with a grazing lease, on May 31, 1991. The EA/ROD contained a number of protective stipulations, including a requirement that cattle be managed in accordance with a rest/rotation grazing system described in the EA/ROD. (EA/ROD at 1, 5-6, 7-8.) The lease contained terms and conditions consistent with the EA/ROD. These terms and conditions included a requirement for herd-grazing for specific areas within the allotment for short periods followed by rest for that previously grazed area. Claiming to have relied on this protective stipulation in the EA/ROD, the individuals and organizations who had protested the proposed decision did not appeal BLM's final decision of May 31, 1991. (Statement of Reasons (SOR) at 3.)

On September 25, 1994, Joseph Feller and Jeff Burgess, two of the Appellants in this case, visited the Santa Maria Ranch allotment and observed groups of cattle dispersed across the northern side of the allotment in a manner they believed inconsistent with the rest-rotation system prescribed in the EA/DR and the grazing lease. (SOR at 4.) The plan they observed in place in September 1994 allowed livestock to be dispersed in the allotment and to remain for most of the year. Both Burgess and Feller then wrote to BLM's Area Manager requesting he take action to enforce the terms of the lease. *Id.* In a letter in response to Burgess, dated December 22, 1994 (December 22 Letter), the Area Manager stated that, in June 1994, "[a]fter an in-house discussion, the BLM decided to allow the lessees" to disperse cattle within the allotment in the manner observed by Appellants. (December 22 Letter at 1.)

Taking the December 22, 1994, letter as a Notice of Decision, Appellants filed a timely appeal of what they considered to be a modification of the lease. Appellants presented four grounds for appeal:

1. The Area Manager's Decision modified the terms and conditions of the grazing lease without prior notice to affected interests, opportunity for protest, or prior consultation with affected interests. The failure to provide prior notice, opportunity for protest, or prior consultation was a violation of 43 C.F.R. §§ 4130.6-3, 4160.1-1, and 4110.3-3(c).

2. The Area Manager's decision significantly and fundamentally changed the grazing management system on the allotment

without the benefit of an environmental assessment (EA). The previous grazing system was adopted after its environmental impacts were analyzed in an EA. The new grazing system, adopted without benefit of an EA, was outside the scope of any of the alternatives considered in the original EA. The adoption of a grazing system that has not been analyzed in any environmental assessment is a violation of the National Environmental Policy Act (NEPA) and 40 C.F.R. §§ 1501.4(b), 1502(b), and 1508.9.

3. The Area Manager's decision violated the Management Framework Plan for the Lower Gila Resource Area by authorizing livestock grazing during the spring and summer growing season in Class II habitat for the Sonoran desert tortoise.

4. The Area Manager's decision allowed livestock to remain for extended periods of time in the riparian areas of desert springs and washes, where they consumed and trampled riparian vegetation, degraded water quality, and destroyed wildlife habitat. This destruction of riparian resources: (a) was contrary to national and State BLM riparian policies; (b) was contrary to the BLM's responsibility to protect ecological, environmental, scenic, scientific, wildlife, and water resources, as set forth in 43 U.S.C. § 1701(a)(8); (c) was contrary to the principle of "multiple use" as defined in 43 U.S.C. § 1702(c); and (d) constituted "unnecessary and undue degradation," in violation of the BLM's responsibilities under 43 U.S.C. § 1732(b).

(SOR at 4-5.)

On March 16, 1995, BLM filed a Motion to Dismiss the appeal, arguing "the issue under appeal was included in a prior decision from which no timely appeals were made." (Motion to Dismiss at 3.) The Motion also stated that "there is no new decision, proposed or final to be appealed." (Motion to Dismiss at 12.)

BLM also argued that the grazing system authorized by the 1994 action, is "within the framework" of the May 31, 1991, EA/DR. See Motion to Dismiss at 6, 9, 15, and 20. Conversely, Appellants argued that the 1994 dispersal plan is not consistent with the 1991 EA/DR because "[t]he EA/DR relied upon grazing periods of a few months followed by rest; the 1994 action allowed livestock in the same places for most of the year." (Answer to Motion to Dismiss at 16.)

In rendering his April 19, 1995, Order dismissing the appeal, Judge Child found the dispositive issue to be "whether a final decision has issued from which appeal may be taken." (Order at 1.) In finding a lack of jurisdiction, Judge Child stated:

This office's jurisdiction is limited to appeals filed by "any person whose interest is adversely affected by a final decision of the authorized officer." 43 CFR 4.470(a) (emphasis

added); see also 43 CFR 4160.4 (reciting the exact same language). 43 CFR 4160.3 makes clear that a "final decision" is a decision in writing which follows the issuance of a proposed decision and an opportunity for affected interests to protest the proposed decision. In this case, no proposed decision was issued, no opportunity was afforded affected interests, and no final decision was issued.

(Order at 1-2.) Standing of Appellants has not been challenged before this Board and their prior participation in the development of the EA/ROD issued in May 1991, and their significant use of the affected land to recreate, as reported in the record, is sufficient to establish standing.

[1] Departmental regulation 43 C.F.R. § 4.470(a) confers the right to appeal from "a decision of an officer of the Bureau of Land Management or of an administrative law judge [ALJ]." The requirement that there be "a decision of an officer" announcing or prohibiting a specific action before there can be an appeal is essential. The "decision" referred to by the regulation has been interpreted to mean that some action affecting individuals having interests in the public lands is either announced or prohibited. Joe Trow, 119 IBLA 388, 392 (1991). In this case, the June 1994 change to the grazing procedures on the Santa Maria Ranch allotment affects the parties' rights on the public lands and takes specific action.

It both establishes and adjudicates new grazing privileges, and in doing so weighs grazing privileges vis-a-vis environmental concerns against a background of public land management and resource policies. For these reasons, it does constitute an appealable decision. See Headwaters, Inc., 101 IBLA 234, 239 (1988); c.f. Defenders of Wildlife, 144 IBLA 250, 255 (1998).

In this case, Appellants seek, by challenging a change in grazing authorization on the Santa Maria Ranch allotment, to ensure that land use planning, resource and environmental issues are fully evaluated with opportunity for public input, comment and contemporaneous right of appeal, prior to implementation of the new decision. BLM's evaluation and planning resulted in the preparation and issuance of BLM's May 31, 1991, EA/ROD, prescribing the management of the Santa Maria Ranch allotment. The use specifications for that allotment were established by those planning processes, not by the June 1994, BLM Decision recited in the December 22, 1994, letter to Appellants.

BLM claims, however, that no new issues not previously determined by the May 31, 1991, EA/ROD have been presented in the new grazing authorization, raises serious issues of fact. BLM claims that "[t]he evidence, as presented hereunder, demonstrates that the [new] action * * * is well within the framework * * * approved on May 31, 1991 * * *." (Motion to Dismiss at 6.) BLM further argues, "[m]oving livestock to different parts of the allotment and allowing them to use more than one use area is consistent with the next best pasture rotations, so the action under appeal herein arguably involves no change in lease terms and conditions." (Motion

to Dismiss at 12.) These factual claims are precisely those challenged by the Appellants. Both of these claims require a hearing and briefing to resolve the factual and legal issues.

In Ervin J. Crowder, 20 IBLA 305 (1975), a case cited by Appellants, the Board reviewed an ALJ's dismissal of an appeal of an earlier decision of a BLM District Manager in which the ALJ ruled that the issues had been settled in the earlier decision, and by failing to timely appeal that decision, the appellant had failed to timely appeal. The Board, in holding the ALJ's dismissal improper, found that it was factually unclear "exactly what was adjudicated" in the prior decision. Id. at 306. We conclude a similar factual uncertainty exists in this case. The factual question exists whether BLM's movement of livestock under the 1994 change is consistent with the next best pasture rotation system contemplated by the EA. If not, the question arises whether this change represents "a change in lease terms and conditions." More specifically, the hearing must determine whether the 1991, EA/ROD, which relied on a strategy of concentration of livestock in one part of the allotment at a time, is consistent with the 1994 action authorizing dispersal of livestock across the allotment.

We thus conclude that the June 1994 change to the grazing authorization, announced in the December 22, 1994, letter to Appellants, did constitute a decision adverse to Appellants and subject to appeal under 43 C.F.R. § 4.470(a). See Joe Trow, *supra*, at 392; Cities of Colorado Springs & Aurora, 77 IBLA 395, 397 (1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the ALJ's Order appealed from is reversed and the case is remanded to the Salt Lake City Office of the Hearings Division, Office of Hearings and Appeals.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge